appeal, *held,* for the plaintiff; the burden of proof being on the defendant, the decision as to facts would not be disturbed. *Woodland State Bank* v. *McKean* (Wash. 1922) 203 Pac. 939.

It is generally stated that the burden of proving a want of consideration in an action on a promissory note is on the defendant. *Spokane State Bank* v. *Pitner* (Wash. 1921) 194 Pac. 969; see (1917) 17 COLUMBIA LAW REV. 717. But in some jurisdictions, although the defendant has the burden of going forward with the evidence, the burden of proving the consideration by a preponderance of the evidence is on the plaintiff. See *Hudson* v. *Moon* (1913) 42 Utah 377, 380 *et seq.,* 130 Pac. 774. Some courts, failing to distinguish between the burden of going forward and the burden of proving, say that the "burden of proof" is on the defendant but shifts to the plaintiff when the defendant introduces evidence of lack of consideration. See *Doyle* v. *Doyle* (Cal. 1919) 186 Pac. 188, 189. If the defense is failure of consideration the burden of proof is on the defendant. See *Portuguese American Bank* v. *Schultz* (Cal. 1920) 193 Pac. 806, 808. But unlike failure of consideration, which is an affirmative defense, want of consideration, though it must be raised by the defendant, is a denial of the consideration presumed in a negotiable instrument. See *Ginn* v. *Dolan* (1909) 81 Ohio St. 121, 127, 90 N. E. 141. This difference in the nature of the two defenses is explicitly recognized even by courts which refuse to give effect to it procedurally. See *Shaffer* v. *Bond* (1917) 129 Md. 648, 658, 99 Atl. 973. The presumption of consideration is a rule of procedure which makes it unnecessary for the plaintiff to allege a consideration. As soon as the defendant has introduced enough evidence to overcome this presumption, the burden of proof should properly be on the plaintiff. The instant case does not follow this rule as the other view is firmly established in its jurisdiction.

PLEADING AND PRACTICE—PROCEDURE UNDER FEDERAL STATUTE ALLOWING EQUITABLE DEFENSES IN LAW ACTIONS.—In an action at law on a contract, the defendant pleaded a release under seal. The plaintiff replied alleging fraud in the procurement of the release. *Held,* for the plaintiff. (1) This defense is available to the plaintiff; (2) the submission to a jury of the issues of fact involved in the equitable defense, is discretionary with the court. *Plews* v. *Burrage* (C. C. A. 1st Cir. 1921) 274 Fed. 881.

Since 1915, by statute, equitable defenses are available in actions at law in the federal courts. (1911) 36 Stat. 1087, 1164, U. S. Comp. Stat. (1916) § 968 (Judicial Code § 274 b); am. by (1915) 38 Stat. 956, U. S. Comp. Stat. (1916) § 1251 b; *United States* v. *Richardson* (C. C. A. 1915) 223 Fed. 1010. The statute reads, "In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court." The courts of the First Circuit allow the plaintiff to set up an equitable reply to a purely legal defense. *Manchester St. Ry.* v. *Barrett* (C. C. A. 1920) 265 Fed. 557. The Second Circuit holds *contra. Keatley* v. *United States Trust Co.* (C. C. A. 1918) 249 Fed. 296. The Supreme Court has not passed on the question. Since the statute was intended to simplify and speed litigation, the holding of the Second Circuit seems erroneous and the instant decision sound. It is everywhere discretionary whether questions of fact in an equity issue shall be submitted to a jury. *Pacific Coal & Transportation Co.* v. *Pioneer Mining Co.* (C. C. A. 1913) 205 Fed. 577. The statute did not attempt to merge law and equity. See *Union Pac. Ry. Co.* v. *Syas* (C. C. A. 1917) 246 Fed. 561, 565. Hence the decision which leaves the procedure of the trial of the equity issues the same as before the passage of the statute, is sound.